UTAH LABOR COMMISSION

ROBERT L. HIGLEY, **Petitioner,** **vs.** **MAC & TOSH CONCRETE[1] and WORKERS COMPENSATION FUND,** **Respondents.**	**ORDER AFFIRMING ALJ'S DECISION** **ORDER OF REMAND** **Case No. 04-1034**

Mac & Tosh Concrete and its insurance carrier, Workers Compensation Fund, (referred to jointly as "Mac" hereafter) ask the Utah Labor Commission to review Administrative Law Judge Marlowe's award of permanent total disability compensation to Robert L. Higley under the Utah Workers' Compensation Act, Title 34A, Chapter 2, Utah Code Annotated.

The Labor Commission exercises jurisdiction over this motion for review pursuant to Utah Code Annotated § 63G-4-301 and § 34A-2-801(3).

BACKGROUND AND ISSUE PRESENTED

Mr. Higley claims permanent total disability compensation for injuries from an accident at Mac on September 7, 2001. Mac argues Mr. Higley is not permanently and totally disabled because he has not shown he is "unable to perform other work reasonably available," as required by § 34A-2-413(1)(c)(iv) of the Utah Workers' Compensation Act. After hearing, Judge Marlowe rejected Mac's argument and found Mr. Higley unable to perform other work. Judge Marlowe then entered a preliminary finding that Mr. Higley is permanently and totally disabled, subject to Mac's right under § 34A-2-413(6) of the Act to submit a reemployment plan for Mr. Higley. Judge Marlowe ordered Mac to submit any such reemployment plan within 30 days and to begin payment of subsistence benefits to Mr. Higley.

In challenging Judge Marlowe's decision, Mac argues that Judge Marlowe: 1) made findings that are inconsistent with the evidence; 2) should have appointed a medical panel to evaluate Mr. Higley's abilities and limitations; 3) misallocated the burden of proof regarding Mr. Higley's ability to perform other work; 4) applied a Commission rule defining "other work reasonably available" that is contrary to statute; and 5) violated Mac's right to due process by requiring submission of a reemployment plan within 30 days.[2]

---

[1] Commission records show the correct name of Mr. Higley's employer is "Mac & Tosh Concrete" rather than "ELM-Mac & Tosh Concrete.

[2] The Commission has changed the order of Mac's arguments to allow for orderly discussion.

FINDINGS OF FACT

The Commission finds the following facts determinative of the issues raised in Mac's motion for review. The Commission also adopts Judge Marlowe's findings to the extent they are consistent with this decision.

Mr. Higley is a 57 year-old man with an 11th grade education. Prior to the work accident that gives rise to his claim for permanent total disability compensation, he had worked for 28 years as a cement finisher and 3 years as a track laborer at Kennecott. Mr. Higley's entire work history has involved physical labor. He has no training or experience in less strenuous occupations.

On September 7, 2001, while working as a cement finisher for Mac, Mr. Higley attempted to jump over wet cement. He fell, landing on his back in shrubbery and decorative rock. He experienced immediate low-back pain which worsened over the next several days. He was diagnosed with a degenerative lumbo-sacral spine condition, bulging discs and peripheral neuropathy. Mr. Higley received conservative medical care, including epidural injections and pain medication, but his physicians did not view him as a suitable candidate for surgery. Mr. Higley continues to suffer significant back pain, as well as numbness and loss of strength in his legs.

On July 8, 2004, Dr. Bowen, an orthopedic specialist, concluded that Mr. Higley had reached medical stability from his spinal injury and had suffered a 5% permanent whole-person impairment from the injury. Dr. Bowen did not assess Mr. Higley's peripheral neuropathy. However, in early 2005, Dr. Miska, a neurological specialist, concluded that Mr. Higley's neuropathy, when combined with his spinal injury, resulted in a 29% permanent whole person impairment. Dr. Miska opined that Mr. Higley should only work in sedentary occupations, which he described as "occupations which allow him to remain seated, not including the operation of heavy mechanical equipment requiring the use of his lower limbs."

Also during early 2005, Dr. Marble, a specialist in physical medicine and rehabilitation, evaluated Mr. Higley's condition on behalf of Mac. Dr. Marble concluded that Mr. Higley had a 13% whole person impairment and was able to perform "sedentary to light activities" but no climbing or working at heights or other precarious positions.

Mr. Higley attempted to return to work, first at Mac and later at temporary-service agencies that offered less-strenuous work. He was unable to perform these types of work due to his back and leg problems.

Mr. Higley is able to drive and take care of his personal needs, and do his own shopping, but he has difficulty maintaining his balance, walking any distance, or climbing stairs. He relies on a variety of narcotic and non-narcotic medications to reduce his pain. Mr. Higley is unable to identify any work he is capable of performing, given his age, education, work experience, physical condition and functional capacity. Likewise, the Social Security Administration has concluded that Mr.

Higley suffers "severe" impairments as a result of his work-related injuries and has been totally disabled since July 1, 2002.

Mac, through its insurance carrier, provided a vocational rehabilitation counselor to assist Mr. Higley in returning to work. After considering Mr. Higley's skills and eliminating occupations that were beyond Mr. Higley's capabilities, the counselor suggested that Mr. Higley look for work with cement companies or sand and gravel operations. The counselor reported that 36 such companies operate in the Salt Lake Valley but little information was provided as to the types of jobs Mr. Higley could perform or whether he had any reasonable chance of being hired for such work.

DISCUSSION AND CONCLUSION OF LAW

There is no dispute that Mr. Higley was injured while working for Mac on September 7, 2001, or that his injuries are compensable under the Utah Workers' Compensation Act. Furthermore, Mac concedes Mr. Higley has satisfied all the Act's requirements for a preliminary finding of permanent total disability except one—the requirement of § 34A-2-413(1)(c)(iv) that Mr. Higley prove he is unable to perform other work reasonably available, taking into consideration his age, education, past work experience, medical capacity and residual functional capacity.

After considering the evidence presented on this issue, Judge Marlowe found that Mr. Higley is unable to perform other work. As previously noted, Mac argues that Judge Marlowe: 1) made findings that are inconsistent with the evidence; 2) should have appointed a medical panel to determine Mr. Higley's physical abilities and limitations; 3) misallocated the burden of proof regarding Mr. Higley's ability to perform other work; 4) applied a Commission rule defining "other work reasonably available" that is contrary to statute; and 5) violated Mac's right to due process by requiring submission of a reemployment plan within 30 days. The Commission considers each of these arguments below.

Accuracy of findings. Mac argues Judge Marlowe's findings of fact are inaccurate because they overlook the testimony of Mac's vocational counselor regarding the types of jobs Mr. Higley can perform and the wages paid for those jobs. However, the hearing record does not support Mac's argument. At best, the counselor provided ambiguous references to various occupations related to cement and sand and gravel companies, including a passing mention of work as a paving machine operator. There was no meaningful discussion of any other work that Mr. Higley might perform, nor was there any discussion of wages paid for such work. The Commission finds no error in Judge Marlowe's findings, which are consistent with the Commission's own findings set forth in this decision.

Appointment of medical panel. Dr. Miska opined that Mr. Higley's work injuries resulted in a 29% permanent whole person impairment and that Mr. Higley could only perform "sedentary" work that did not require use of his legs. Dr. Marble opined that Mr. Higley had suffered a 13% permanent whole person impairment and was restricted from doing anything more than "sedentary to

light" work. Mac argues that, in light of this difference of medical opinion, Judge Marlowe was obligated to appoint a medical panel to address Mr. Higley's impairments and capabilities.

Section 34A-2-601 of the Utah Workers' Compensation Act gives the Commission's administrative law judges discretion to appoint panels of experts to consider the medical aspects of disputed workers' compensation claims. The Commission has promulgated Rule R602-2-2 to guide the administrative law judges' exercise of this discretion (emphasis added):

> Pursuant to Section 34A-2-601, the Commission adopts the following **guidelines** in determining the necessity of submitting a case to a medical panel:
>
> A. A panel will be utilized by the Administrative Law Judge where one or more significant medical issues may be involved. **Generally** a significant medical issue must be shown by conflicting medical reports. Significant medical issues are involved when there are:
>
> 1. Conflicting medical opinions related to causation of the injury or disease;
>
> 2. Conflicting medical reports of permanent physical impairment which vary more than 5% of the whole person,
>
> 3. Conflicting medical opinions as to the temporary total cutoff date which vary more than 90 days;
>
> 4. Conflicting medical opinions related to a claim of permanent total disability, and/or
>
> 5. Medical expenses in controversy amounting to more than $10,000.

Because Rule R602-2-2 serves as a guideline rather than a rigid formulation, administrative law judges retain some discretion in determining whether a medical panel referral is necessary in a particular case. And while conflicting medical reports "generally" serve as a basis for appointing a medical panel, an ALJ may choose not to appoint a medical panel if the conflicting reports are not significant in the context of the particular case.

In this case, Dr. Marble assesses Mr. Higley's impairments and functional limitations somewhat more conservatively that does Dr. Miska. However, even if Dr. Marble's more conservative assessment is accepted as correct, the evidence still establishes that other work is not reasonably available to Mr. Higley. Mr. Higley's age, lack of education or training, and a work history limited to strenuous labor preclude his employment in many occupation—particularly in many "sedentary" or "light duty" jobs. Mr. Higley has actually tried to return to work at Mac and elsewhere without success. Mr. Higley is unaware of any other work he can do, and Mac has not submitted any convincing contrary evidence that other work actually exists for Mr. Higley, regardless of whether it is "sedentary" work or "sedentary to light" work. Under these

circumstances, the Commission concurs with Judge Marlowe's judgment that it was unnecessary to refer Mr. Higley's claim to a medical panel in order to resolve the differences between Dr. Miska and Dr. Marble's opinions.

Allocation of burden of proof. Mac is correct in asserting that Mr. Higley has the burden of proving that he cannot perform other work reasonably available. The Utah Supreme Court settled that question in *Martinez v. Media-Paymaster Plus, et al.*, 164 P.3d 384 (Utah 2007). But as the Court observed in a footnote to its decision in M*artinez,* "[u]sually, burden of proof questions are outcome determinative only in the case of an evidentiary draw." *Martinez,* 164 P.3d at 397, With respect to Mr. Higley's claim for permanent total disability compensation, there is no "evidentiary draw." The preponderance of evidence establishes that he cannot perform other work reasonably available. Furthermore, the Commission sees nothing in Judge Marlowe's decision to indicate that she improperly allocated the burden of proof to Mac, rather than to Mr. Higley where it belonged.

Application of Commission rule defining "other work reasonably available." Mac argues the Commission exceeded its authority by promulgating Rule R612-1-10.D.1, which takes into consideration the wage offered by "other work" in deciding whether that work is "reasonably available." *In LPI Services et al. v. Labor Commission et al*., 173 P. 3d 858 (Utah App. 2007), the Utah Court of Appeals upheld the validity of the Commission's rule. The matter is now pending review of the Utah Supreme Court. But whether or not the Supreme Court upholds the Commission's rule, the Commission does not view the application of the rule as determinative in this case. Mr. Higley cannot perform other work because of his age and limitations to his education, work experience, physical condition and functional capacity. Since there is no other work Mr. Higley is capable of performing, it is unnecessary to consider the question of wages. Thus, in the context of this case, there is no need to address the wage requirements of Rule R612-1-10.D.1.

Requirement for submission of a reemployment plan as a violation of due process. Section 34A-2-413(6)(a) and (e) of the Utah Workers' Compensation Act provide that a finding by the commission of permanent total disability compensation is not final until, among other things, the employer and its insurance carrier are allowed an opportunity to choose whether to submit a reemployment plan for the injured worker. For that reason, Judge Marlowe entered only a "preliminary" finding that Mr. Higley was permanently and totally disabled. Judge Marlowe allowed Mac 10 days to state whether it would submit a reemployment plan, and 30 days to actually submit the plan.

Although Mac asserts that the foregoing provisions of Judge Marlowe's order deprived Mac of its right to due process, it has submitted no analysis or explanation to support its argument. Furthermore, Mac's apparent concerns are addressed by the Commission's Rule R612-1-10.C.1.b (emphasis added):

> (b) A party dissatisfied with the ALJ's preliminary determination may obtain additional agency review by either the Labor Commissioner or Appeals Board pursuant to Subsection 34A-2-801(3). **If a timely motion for review of the ALJ's**

> **preliminary determination is filed with either the Labor Commissioner or Appeals Board, no further adjudicative or enforcement proceedings shall take place pending the decision of the Commissioner or Board.**

Pursuant to the foregoing rule, as soon as Mac filed its timely motion for review in this matter, further proceedings regarding reemployment were stayed until the Commission ruled on the motion for review. The Commission does not discern any violation of Mac's right to due process under this procedure.

Summary. The Commission has carefully reviewed the evidence submitted by the parties in this proceeding. Based on that evidence, the Commission affirms Judge Marlowe's determination that Mr. Higley has satisfied each of § 34A-2-413(1)(b) and (c)'s requirements for a preliminary finding of permanent total disability compensation. The Commission ratifies Judge Marlowe's order that Mac commence payment of subsistence benefits to Mr. Higley beginning July 18, 2004, and continuing until ordered otherwise. The Commission will remand Mr. Higley's claim to Judge Marlowe to determine whether Mac will submit a reemployment plan and to conduct any proceedings necessary to complete the adjudication of this matter.

ORDER

The Commission affirms Judge Marlowe's decision and remands this matter to Judge Marlowe for further proceedings consistent with this decision.

Dated this 15th day of September, 2008.

_____
Sherrie Hayashi
Utah Labor Commissioner

NOTICE OF APPEAL RIGHTS

Any party may ask the Labor Commission to reconsider this Order. Any such request for reconsideration must be received by the Labor Commission within 20 days of the date of this order. Alternatively, any party may appeal this order to the Utah Court of Appeals by filing a petition for review with the court. Any such petition for review must be received by the court within 30 days of the date of this order.